

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DEBORAH K. MAY, Employee,**

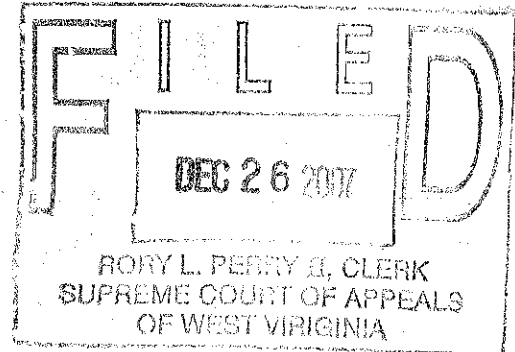
**Appellant,**

**v.**

Appeal No.: 33703

**CHAIR and MEMBERS, Board of Review;  
COMMISSIONER, West Virginia Bureau of  
Employment Programs; and MATE CREEK  
SECURITY, INCORPORATED, Employer,**

**Appellees.**



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**BRIEF OF APPELLEE, MATE CREEK SECURITY, INCORPORATED**

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## **I. INTRODUCTION**

Mate Creek Security, Incorporated ("Mate Creek"), hereby respectfully submits its brief on appeal. Succinctly, (1) the Deputy, (2) the Administrative Law Judge ("ALJ"), (3) the Board of Review for the West Virginia Bureau of Employment Programs ("Board of Review"), and, (4) most recently, the Circuit Court of Kanawha County (Stucky, J.) have all correctly found Deborah K. May ("Claimant" or "Ms. May") disqualified from receiving unemployment compensation benefits. All four tribunals found that Ms. May left her job with Mate Creek voluntarily without good cause involving fault on the part of Mate Creek. Instead, the substantial evidence from the record shows Ms. May quit her employment because Mate Creek refused to capitulate to her repeated demands for a raise. Based upon the factual findings of the ALJ, as affirmed by the Board of Review and circuit court and which are not clearly wrong, Ms. May is disqualified from receiving unemployment compensation benefits, and this Court should affirm the decision of the Board.

## **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

Ms. May worked as a contract laborer for Mate Creek from May 4, 2001, through November 18, 2005. Tr. at 9, 10.<sup>1</sup> During the entire period of Claimant's employment with Mate Creek, she worked in a single position: the personal maid for Don Blankenship ("Mr. Blankenship"). Tr. at 41. Her responsibilities as a personal maid included cleaning, maintaining the upkeep of his residences and carrying out other personal household tasks as requested. Tr. at 10-11. These responsibilities never varied, and Ms. May offered no evidence that she was ever expected to perform any duties other than those associated with her position as a personal maid at any time during the course of her employment.

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<sup>1</sup> All references to the transcript and corresponding exhibits refer to the evidentiary hearing conducted before the ALJ.

Claimant was hired to maintain Mr. Blankenship's residences as needed. For example, in December 2002, when Mr. Blankenship moved from Sprigg, West Virginia to Kentucky, Claimant continued to carry out her duties as a personal maid at the new residence. Tr. at 11-12. When Mr. Blankenship returned to his residence in Sprigg in June 2003, Ms. May again assisted in the move and maintained the new residence. Tr. at 12. While the Claimant's responsibilities as a personal maid also incorporated the upkeep of motor homes owned by Mr. Blankenship, these duties *never varied in type or scope from what Ms. May was hired to do*. Tr. at 14.

The Claimant's first demand for a raise occurred approximately one month after she helped Mr. Blankenship move from Kentucky back to his residence in Sprigg (approximately July 2003). Tr. at 13. As Claimant concedes, this was the first of several demands for more pay – she did so on at least five occasions, including making demands of Mr. Blankenship, even though he was not responsible for paying her. Tr. at ALJ Ex. 2; Tr. at 12-13. In fact, Ms. May continued her efforts to secure a pay raise and other benefits through her last days with Mate Creek and it was Mate Creek's decision not to accede to her demands that led to her resignation. On November 18, 2005, Ms. May submitted an ultimatum to Mate Creek: she would quit unless the company gave her a 35% pay increase (to \$12.00 per hour), a company vehicle, and additional free medical insurance. Tr. at ALJ Ex. 2. When Mate Creek did not immediately capitulate to Ms. May's demands, she voluntarily quit her employment and gave two weeks' notice. Tr. at 9; Tr. at ALJ Ex. 2.

Claimant filed an unemployment compensation claim with the Bureau of Employment Programs on or about November 28, 2005. In her explanation for why she quit her job, Ms. May stated in her statement:

I quit because I was not given a *pay raise* . . . The last *pay raise* I received was in 2002. During my employment I asked for *pay*

*increases* that were denied. The last time I requested a *pay raise* was approximately 09/05.<sup>2</sup> This was creating stress for me as the cost of living keeps going up. A couple of weeks ago due to stress I went to the doctor. I kept working. My goal was to get a *pay raise*. . . . Prior to quitting I told Harold Osborne, he is the person employees are to talk to and then he talks to the employer. I told him that I was tired of my job duties increasing<sup>3</sup> and not getting a *pay increase*. This was on the day I submitted my resignation. He asked me what would they have to do to keep me working. *I told him that I required a wage of \$12.00 per hour, a company vehicle, and medical insurance for my children . . .*

Tr. at ALJ Ex. 2 (emphasis added). On December 5, 2005, the Williamson deputy hearing officer—apparently noticing that Ms. May mentioned her lack of a pay raise seven times in a single paragraph where she explained why she voluntarily quit her job with Mate Creek—denied Claimant’s claim for unemployment benefits; the Deputy ruled that Claimant “quit because she was not given a pay raise she requested.” Tr. at ALJ Ex. 1.

Ms. May appealed on January 6, 2006, and in a hearing conducted before Chief Administrative Law Judge Marcella Townsend, both she and Johnny Fullen, Human Relations Director appearing on behalf of Mate Creek, testified. Decision of Marcella Townsend, Chief Administrative Law Judge (hereinafter “ALJ Decision”) at 1. While Ms. May alleged that her hours of work increased during the course of her employment, she offered no factual support for this contention; she only offered into evidence a single time card which could not show whether her hours increased, decreased or remained constant in other time periods. Tr. at Claimant’s Ex. 1. This time card establishes that Ms. May was fully compensated for her work and that she was paid proper overtime of \$13.29 hour for the hours she worked in excess of forty hours in the

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<sup>2</sup> Claimant later describes a demand for a pay raise in November 2005.

<sup>3</sup> They did not; Ms. May worked as a personal maid for the entire time she worked at Mate Creek. Notably, Ms. May makes only a passing – and unsupported – reference to her job duties increasing while repeatedly discussing Mate Creek’s failure to give her a raise.

week.<sup>4</sup> Tr. at 38 and Claimant's Ex. 1. In a decision dated January 12, 2006, the ALJ found that the Claimant left work voluntarily; she quit her job primarily due to the fact that she did not receive an increase in her pay. ALJ Decision at 2. The ALJ opined that "[t]he [C]laimant provided credible testimony that she had numerous job responsibilities to perform her job as personal maid cleaning, grocery shopping, and running errands for Mr. Blankenship . . . *None of the issues raised by the [C]laimant rise to the level to show good cause to quit her job.*" *Id.* (emphasis added). In sum, the ALJ affirmed the Deputy's decision: the Claimant left work voluntarily without good cause involving fault on part of the employer. *Id.* at 3.

Claimant again appealed, and on March 1, 2006, the Board of Review affirmed the ALJ's ruling and adopted her findings in their entirety. Claimant again appealed, but the Circuit Court of Kanawha County affirmed the decision of the Board of Review in an Order entered January 19, 2007. Despite her loss at all four prior levels, Claimant again appealed, and now seeks this Court to review and overturn the consistent findings of all four tribunals.

### **III. SUMMARY OF ISSUES PRESENTED**

In each proceeding below, Ms. May was disqualified from receiving unemployment compensation benefits because she voluntarily left her job "without good cause involving fault on the part of the employer." The substantial evidence from the record shows Ms. May quit her employment because Mate Creek refused to acquiesce to her repeated demands for a raise. Based upon the twice-affirmed factual findings of the ALJ, which are not clearly wrong, Ms. May is disqualified from receiving unemployment compensation benefits. On March 1, 2006, the Board of Review adopted and affirmed the ruling of the ALJ, and the Circuit Court of Kanawha County affirmed the ruling of the Board of Review.

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<sup>4</sup> Ms. May does not assert that she was ever denied payment for her work.

The factual findings of the ALJ were not clearly wrong—the substantial evidence on the record supports the finding that the Ms. May left her job without good cause. There were no qualitative changes in Claimant's duties as a personal maid; she left her job because she was dissatisfied that her requests for a raise were denied. For these reasons, this Court should affirm the decisions of the circuit court, Board of Review, ALJ and Deputy, and deny Complainant's appeal.

#### IV. POINTS AND AUTHORITIES RELIED UPON

1. Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, W. Va. Code § 29A-5-4(g), the decision of the agency shall be upheld unless the administrative findings, inferences, conclusions, decisions or orders are "... **clearly wrong** in view of the reliable, probative and substantial evidence on the whole record." Syl. pt. 2, *Shepherdstown V.F.D. v. W.Va. Human Rights Commission*, 172 W. Va. 627, 309 S.E.2d 342 (1983).
2. "[T]he **findings of fact of the board** shall have like weight to that accorded to the findings of fact of a trial chancellor or judge in equity procedure." W. Va. Code § 21A-7-21 (emphasis added). Accordingly, "[f]indings of fact by the Board of Review of the West Virginia Department of Employment Security, in an unemployment compensation case, should not be set aside unless such findings are plainly wrong; . . . ." W. Va. Code § 21A-7-21; Syl. pt. 1, in part, *Kisamore v. Rutledge*, 166 W. Va. 675, 276 S.E.2d 821 (1981).
3. In other words, the Board's findings of fact are entitled to "substantial deference" and should not be set aside unless the reviewing court believes the findings are "clearly wrong." *Private Indus. Council of Kanawha County v. Gatson*, 199 W. Va. 204, 206, 483 S.E.2d 550, 552 (1997).
4. Additionally, the fact finder is in a position to observe the demeanor of the witnesses and other nuances of the testimony and hearing – nuances which the transcript or other record documents simply cannot capture. *Gum v. Dudley*, 202 W. Va. 477, 484, 505 S.E.2d 391, 398 (1997); see also *State v. Butcher*, 165 W. Va. 522, 526, 270 S.E.2d 156, 159 (1980) ("The trial court had the benefit of observing the demeanor of the witness as he testified, and we



are without such benefit.”). “A reviewing court cannot assess witness credibility through a record.” *Michael D. C. v. Wanda L. C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997); *see also Board of Education of County of Wood v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422, 426 (2002) (credibility determination by judge who observed testimony should be given great deference).

5. “[S]ubstantial unilateral changes in the terms of employment furnish ‘good cause involving fault on the part of the employer’ which justify employee termination of employment and preclude disqualification from the receipt of unemployment compensation benefits.” Syl. pt. 2, in part, *Murray v. Rutledge*, 174 W. Va. 423, 327 S.E.2d 403 (1985); Syl. pt. 1, *Wolford v. Gatson*, 182 W. Va. 674, 391 S.E.2d 364 (1990).

6. In determining whether substantial unilateral changes in an employee’s terms of employment had taken place, this Court has evaluated *qualitative* changes in the employee’s occupational duties. *Private Indus. Council*, 199 W. Va. at 209; 483 S.E.2d at 555.

7. Customary working conditions not involving deceit or other wrongful conduct on the part of the employer are not sufficient reason for an employee to leave her most recent work voluntarily. *Denny v. Rutledge*, 174 W. Va. 820, 329 S.E.2d 893 (1985).

## V. ARGUMENT

### A. Standard of Review

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, W. Va. Code § 29A-5-4(g), the decision of the agency shall be upheld unless the administrative findings, inferences, conclusions, decisions or orders are “. . . *clearly wrong* in view of the reliable, probative and substantial evidence on the whole record.” Syl. pt. 2, *Shepherdstown V.F.D. v. W.Va. Human Rights Commission*, 172 W. Va. 627, 309 S.E.2d 342 (1983) (emphasis added). “[T]he *findings of fact of the board* shall have like weight to that accorded to the findings of fact of a trial chancellor or judge in equity procedure.” W. Va. Code § 21A-7-21 (emphasis added). Accordingly, “[f]indings of fact by the Board of Review of the

West Virginia Department of Employment Security, in an unemployment compensation case, should not be set aside unless such findings are plainly wrong; . . . .” W. Va. Code § 21A-7-21; Syl. pt. 1, in part, *Kisamore v. Rutledge*, 166 W. Va. 675, 276 S.E.2d 821 (1981). In other words, the Board’s findings of fact are entitled to “substantial deference” and should not be set aside unless the reviewing court believes the findings are “clearly wrong.” *Private Indus. Council of Kanawha County v. Gatson*, 199 W. Va. 204, 206, 483 S.E.2d 550, 552 (1997). In *Private Indus. Council*, the Supreme Court of Appeals gave guidance as to “how wrong” a finding of fact must be before it is “clearly wrong.” A “clearly wrong” finding is one that was not supported by any record evidence or one that contradicts the only record evidence on a point. *Id.* at 208, 483 S.E.2d at 554 (holding it is “clearly wrong” to establish the value of a fringe benefit at a higher level than the employee’s own testimony regarding the value of said benefit without other evidentiary support for the finding). Under this highly deferential standard, the Board of Review’s findings of fact in this case are correct and not clearly wrong.

**B. There is Substantial Evidence from the Record as a Whole to Support the ALJ’s and Board of Review’s Decision that Ms. May Left Her Employment Without Good Cause**

As the ultimate fact-finder and arbiter of credibility, the ALJ conducted a fact-finding hearing where she heard the testimony of Ms. May and Mr. Fullen, Mate Creek’s representative. After personally witnessing this testimony, the ALJ found Ms May was disqualified from receiving unemployment compensation benefits because she voluntarily quit her employment without good cause involving fault on the part of the employer. Specifically, the ALJ held:

The facts of this case demonstrate that the claimant quit her job primarily due to the fact that she felt that Mr. Blankenship did not appreciate her hard work. The claimant provided credible testimony that she had numerous job responsibilities to perform her job as a personal maid cleaning, grocery shopping, and running

errands for Mr. Blankenship. However, mere dissatisfaction with ones [sic] job is insufficient to support a finding that she quit her job with good cause involving fault on the part of the employer. None of the issues raised by the claimant rise to the level to show good cause to quit her job.

Petitioner's Ex. 1. The claimant may have experienced some dissatisfaction with her work, but the record reveals only dissatisfaction with job conditions and pay, issues which the ALJ correctly held to be insufficient as a cause for termination. The testimony on record contained substantial evidence upon which the ALJ could base her findings:

- (1) Claimant did not ask for a raise until six months after she alleges she was given "extra duties" (Tr. at 11-13);
- (2) Claimant worked in the same position the entirety of her employment (Tr. at 9);
- (3) Claimant voluntarily quit her job (*Id.*);
- (4) Claimant's own, self-serving handwritten notes establish that her duties never varied from that of personal maid (Tr. at Claimant's Exhibit 3);
- (5) Claimant continued to work notwithstanding her allegations of increased duties—she testified that she was required to maintain the business cabins and Sprigg house sometime in December of 2002, yet she did not voluntarily quit her employment until **November 18, 2005** (*See, e.g.*, Tr. at 9-12);
- (6) Claimant voluntarily quit her employment immediately after Mate Creek refused her ultimatum for a 35% pay hike (Tr. at ALJ Exhibit 2);
- (7) Claimant testified that she would return to her employment if her demands for a raise were met (Tr. at 45-46).

Those findings are supported by credible evidence, and they are binding upon this Court. *Every* tribunal below came to the same exact conclusion: the Claimant left her employment without good cause involving fault on the part of the employer. This is Claimant's fifth bite at this apple and the result must inevitably be the same: this Court should uphold the decisions of the Deputy, the ALJ, the Board of Review and the Circuit Court of Kanawha County.

1. *This Court should not disturb findings based on credibility determination made by the fact finder.*

As is often the case, the factual findings are based on credibility determinations. Specifically, this case turns on Ms. May's unsupported allegations that her job duties increased, allegations that were rebutted by Mr. Fullen. The ALJ heard both witnesses testify and found Ms. May's testimony on this point to be not credible. The ALJ's findings were adopted in their entirety by the Board of Review. Critically, the fact finder is in a position to observe the demeanor of the witnesses and other nuances of the testimony and hearing – nuances which the transcript or other record documents simply cannot capture. *Gum v. Dudley*, 202 W. Va. 477, 484, 505 S.E.2d 391, 398 (1997); *see also State v. Butcher*, 165 W. Va. 522, 526, 270 S.E.2d 156, 159 (1980) ("The trial court had the benefit of observing the demeanor of the witness as he testified, and we are without such benefit."); "A reviewing court cannot assess witness credibility through a record." *Michael D. C. v. Wanda L. C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997); *see also Board of Education of County of Wood v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422, 426 (2002) (credibility determination by judge who observed testimony should be given great deference).

The ALJ listened to the testimony of Ms. May and Mr. Fullen and weighed their credibility. While the ALJ found Ms. May's testimony to be credible with regard to the type of duties she performed, the ALJ did *not* find her testimony that her workload increased to be credible because she rejected this argument. Instead, the ALJ listened to Ms. May describe why she lost her job and found the main reason was she was dissatisfied with her job conditions (including the pay) which did not rise to the level of "good cause on the fault of her employer" to permit claimant to voluntarily quit her job. Simply, the ALJ heard no *credible* testimony that Plaintiff's job duties varied during the course of her employment. Certainly, the minimal

documentary evidence offers no support. Recognizing the ALJ's unique role as the ultimate fact finder and arbiter of credibility, the Board of Review and the circuit court affirmed the ALJ's decision. Accordingly, this Court should also affirm the holdings below.

2. *There were no qualitative changes in Ms. May's duties as a personal maid.*

Under West Virginia law: "[S]ubstantial unilateral changes in the terms of employment furnish 'good cause involving fault on the part of the employer' which justify employee termination of employment and preclude disqualification from the receipt of unemployment compensation benefits." Syl. pt. 2, in part, *Murray v. Rutledge*, 174 W. Va. 423, 327 S.E.2d 403 (1985); Syl. pt. 1, *Wolford v. Gatson*, 182 W. Va. 674, 391 S.E.2d 364 (1990). In determining whether substantial unilateral changes in an employee's terms of employment have taken place, this Court has evaluated *qualitative* changes in the employee's occupational duties—quite contrary to Claimant's proposal that this Court evaluate her asserted changes on a *quantitative* basis only. *Private Indus. Council*, 199 W. Va. at 209; 483 S.E.2d at 555. There, the Court held that an employer's decision to preclude future personal use of the company vehicle and restrict use of the company car to business resulted in no more than a "minor change" in the employee's job and *not* a substantial change in terms of employment. *Id.* Quantitative changes alone in a job where job duties are not altered or pay decreased, are not good cause for an employee to leave her employment, especially where the employee continued in her employment for an additional nine months after the change. *Id.*

Claimant has failed to meet her burden of proof that the alleged increase in her duties as a personal maid constituted a substantial unilateral change in her duties. Similar to *Private Indus. Council*, claimant's job duties were not altered, her salary was not reduced, and she continued in Mate Creek's employment for many months after the alleged substantial changes were made to

the terms of her employment—she testified that she was required to maintain the business cabins and Sprigg house sometime in December of 2002, yet she did not voluntarily quit her employment until *November 18, 2005*. See, e.g., Tr. at 9-12. Even under the most deferential reading of the testimony on Claimant's behalf (a reading rejected by the ALJ and Board of Review), Ms. May's duties were unchanged for more than three years.

Like the claimant in *Private Indus. Council*, she failed to carry her burden of establishing that the duties she performed exceeded the scope or type of her duties as a personal maid. It is well settled that dissatisfaction with one's work load or hours does not constitute good cause for leaving employment. See, e.g., *In re Peak*, 9 A.D.3d 779, 779 N.Y.S.2d 870 (N.Y.S.App.Div. 2004). She produced nothing in writing (other than her own self-serving notes whose credibility was clearly rejected by ALJ) or any corroborating testimony to show that the personal maid duties she performed ever changed qualitatively. As recognized by this Court, "mere assertions" by a claimant are insufficient to sustain allegations of a unilateral job change. *Private Indus. Council*, 199 W. Va. at 208, 483 S.E.2d at 554. Accordingly, this Court should affirm the Board's decision that Claimant is disqualified from receiving unemployment compensation benefits; to do otherwise would dramatically alter the prevailing unemployment case law in West Virginia.

This case, like *Private Indus. Counsel*, is easily distinguished from the *Brewster* case upon which Ms. May relies. *Brewster v. Rutledge*, 176 W. Va. 265, 342 S.E.2d 232 (1986). In *Brewster*, the employee's hourly *rate of pay was unilaterally reduced* from \$3.35 per hour to \$2.25 per hour, and his *job duties were changed* from a night watchman to include janitorial work. *Brewster*, 176 W. Va. at 233, 342 S.E.2d at 266. The *Brewster* Court found the qualitative change in the claimant's occupational duties – to include janitorial work – combined

with the reduction in claimant's wages constituted a substantial change which was good cause on the part of the claimant's employer for the claimant to quit. *Id.*

As it was in *Private Indus. Council*, the Court's decision in *Murray* is also clearly distinguishable. In *Murray* this Court held a full-time, salaried restaurant manager who was not working in the kitchen was justified in resigning from employment and was entitled to unemployment benefits where: (1) she was assigned additional duties of working in the kitchen and (2) her work hours increased significantly but she did not receive an increase in compensation. In comparison, Ms. May's job duties were not altered; at all times, her duties remained consistent with those of a personal maid. Ms. May's duties at the time of her resignation were no different than when she was hired; there were no unilateral changes in her duties that were substantial. To the extent Ms. May's hours of work increased, and there is no credible evidence that they did, Ms. May admits she was paid overtime when she worked overtime. Tr. at 38. Consequently, her pay would have increased with the receipt of the overtime, as opposed to remaining constant as it did in *Murray*.

Finally, Claimant's reliance on *Wolford* is equally unavailing. *Wolford* was originally hired as a full-time butcher. The *Wolford* Court held that a unilateral change of a store employee's hours which resulted in a 25% **reduction** in pay and change in regular duties to include the additional duty of cleaning the store owner's home as part of the employee's regular employment were substantial enough to constitute good cause involving fault on the employer. Ms. May suffered no reduction in pay whatsoever; nor did her duties change. If anything, Ms. May's pay would have increased with any additional hours because she was paid on an hourly basis with overtime and not on an unchanging salary.

Simply put, Ms. May's duties never changed. She was never asked to perform duties where she did not have any training or expertise. Instead, Ms. May's duties as a personal maid were consistent throughout her employment with Mate Creek. The transcript and exhibits – the only record evidence before the Court – establish that during her employment, Ms. May's duties encompassed cleaning, performing chores and running errands as needed by Mr. Blankenship. Tr. 11, 14, and 37; Claimant's Ex. 3. These were duties at the beginning of her employment, those were the duties at the end; those were the duties at all times she worked for Mate Creek. The scope or type of her duties never exceeded those of a personal maid. All evidence supports the Board of Review's conclusion that Mate Creek was not at fault when Ms. May quit her job voluntarily. Appropriately, the Board of Review's decision was affirmed by the circuit court; this Court should also affirm.

3. *Ms. May's accepted any alleged change in duties by not voluntarily quitting her job until more than three years after the alleged change.*

The timing of Ms. May's decision to quit is also substantial evidence that she did not have good cause to voluntarily quit her job with Mate Creek. Unlike the employee in *Brewster* (who declined to accept his new assignments because they were beyond his occupational skills), Claimant continued to perform all of her assignments, even the ones that "changed," for over three years. Claimant continued her employment with Mate Creek after the so-called "extension" of her personal maid duties in 2002 until her decision to quit in November 2005. Her continued performance of these domestic responsibilities, even when she claimed they were augmented, is confirmation that all of the assignments she received were routine and fell squarely within her job duties. The Claimant ratified as customary or routine those duties she



perceived were "additional duties" by performing them for several years. As this Court held in *Private Indus. Counsel*:

However, we are not willing to extend *Wolford* and its progeny to the factual setting of this case. Unlike the claimants in *Wolford*, *Brewster* and *Murray*, respondent's job duties were not altered and her salary was not reduced. Her personal use of the company car was justifiably terminated due to a concern over potential liability if an accident should occur. ***In spite of this minor change, respondent continued in the employment of petitioner for an additional nine months after the car was restricted to only business use.***

*Private Indus. Counsel*, 199 W. Va. at 209, 483 S.E.2d at 555 (emphasis added). Ms. May cannot now claim the duties she customarily performed constituted additional job responsibilities where she continued to perform them for over three years after the alleged change. If the nine months in which the claimant performed the changed job in Private Indus. Council constituted a ratification of the new position, the three years in which Ms. May continued to perform her duties for Mate Creek is a ratification.

4. *Claimant quit because she did not get a pay raise.*

Despite Claimant's belated attempts to pigeonhole her decision to quit her job into some case law, the overwhelming evidence establishes that—just as the ALJ concluded and the Board of Review and circuit court affirmed—Ms. May voluntarily quit her job because she wanted to be paid more than Mate Creek was willing to pay. There is nothing wrong with Claimant's decision to quit her job unless she received her requested 35% pay increase; Mate Creek does not dispute that she was entitled and lawfully able to quit for this reason. But quitting because Mate Creek rejected her pay increase demand disqualifies Ms. May from receiving unemployment compensation. Ms. May is simply trying to avoid the consequences of her decision to quit her employment when Mate Creek refused to give her a pay increase.

The West Virginia Code provides that an individual is disqualified from receiving unemployment compensation when she voluntarily quits employment without good cause involving fault on the part of the employer. W. Va. Code § 21A-6-31(1). The Claimant admitted during the evidentiary hearing before the ALJ that she voluntarily quit her employment on November 18, 2005, after having given a two-week notice. Tr. at 9. There is no issue of whether she voluntarily quit or was discharged.

Claimant's reasons for voluntarily terminating her employment do not constitute fault on the part of her employer, Mate Creek. The record overwhelmingly establishes that Ms. May quit her job because Mate Creek did not agree with her demand for a pay increase. When filing her claim, Claimant stated that she "quit because [she] was not given a pay raise." Tr. at ALJ Ex. 2. Claimant cited this lack of a pay raise no less than eight times (seven times in the main paragraph) in her application. *Id.* Claimant admitted that she demanded, and was denied, a pay raise on at least five occasions. *Id.* She admitted she would not have quit her employment if Mate Creek agreed to raise her pay to \$12.00 an hour and to give her a company car and medical insurance. *Id.* When testifying before the ALJ regarding the circumstances surrounding her decision to quit her job at Mate Creek, Ms. May responded "... it's not all necessarily about pay, *but I haven't got any pay raises. I've got one pay raise in four years.*" Tr. 44 (emphasis added). Finally, Ms. May testified under oath that she would "be glad to come back to work" if only her salary demands were met. Tr. at 45. Ms. May's reasons for terminating her employment begin and end with her demands for a raise in wages; everything else is white noise designed to distract this Court from Ms. May's true motivation. Mate Creek's declining to increase Ms. May's wages does not constitute a substantial unilateral change in Ms. May's terms

of employment furnishing good cause involving fault on the part of the employer and the Board of Review's decision should be affirmed.

5. *Personality conflicts are not enough to establish substantial unilateral change in employment.*

Customary working conditions not involving deceit or other wrongful conduct on the part of the employer are not sufficient reason for an employee to leave her most recent work voluntarily. *Denny v. Rutledge*, 174 W. Va. 820, 329 S.E.2d 893 (1985). There is no dispute that "[t]he claimant worked directly with Don Blankenship . . ." ALJ Decision at 1. Given the frequency and proximity with which Ms. May worked with Mr. Blankenship, Ms. May testified about exchanges between the two. The conversations described by Ms. May – albeit colorful<sup>5</sup> – at her evidentiary hearing constituted customary working conditions not involving deceit or other wrongful conduct on the part of Mate Creek. Ms. May herself described the conversations as nothing more than "just a bunch of stuff . . . verbal stuff that has went on over the years." Tr. at 29-31, 36. Ms. May was never formally disciplined while working for Mate Creek as a result of these exchange, or for any other reason. Tr. at 20. While her testimony identifies that personality conflicts periodically existed between Ms. May and Mr. Blankenship<sup>6</sup> (and explains why Claimant felt it difficult to please Mr. Blankenship), these conflicts do not rise to meet the level of fault on the part of an employer (here Mate Creek, not Mr. Blankenship) necessary for Ms. May to qualify for unemployment benefits. ALJ Decision at 2.

While eavesdropping on the disagreements between Ms. May and Mr. Blankenship may be of interest,<sup>7</sup> such disagreements do not rise to the level of deceit or wrongful conduct by

<sup>5</sup> Mr. Blankenship is not Claimant's employer. Nor is he a party to the proceeding and did not appear, or have any reason to appear, at the evidentiary hearing.

<sup>6</sup> Since he was not her employer, Mr. Blankenship had no reason to appear at the hearing before the ALJ, nor was he subpoenaed to appear.

<sup>7</sup> Despite his minimal relevance, Ms. May refers to Mr. Blankenship in the Appellant's Brief no less than 23 times.

Ms. May's employer, Mate Creek. Claimant's recitation of the exchanges between the two is nothing but an attempt to distract this Court from the decision of the Board:

The facts of this case demonstrate that the claimant quit her job primarily due to the fact that she felt that Mr. Blankenship did not appreciate her hard work. However, mere dissatisfaction with one's job is insufficient to support a finding that she quit her job with good cause involving fault on the part of the employer. None of the issues raised by the claimant rise to the level to show good cause to quit her job.

ALJ Decision at 1. This statement is simple, direct and correct. The decision of the Deputy, ALJ, Board and circuit court should be affirmed.

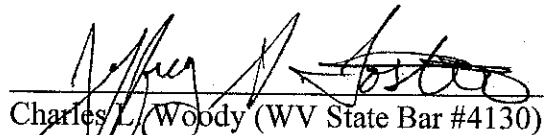
## VI. CONCLUSION

This Court should reject Claimant's petition for appeal: there is no reason to reverse the decision of four separate adjudicators where Ms. May cannot any evidence that the findings of the Board of Review were clearly wrong. Nothing in the Appellant's Brief changes the record below that there were *no* unilateral substantial changes in Ms. May's terms of employment. Claimant stated her goal had been "to get a pay raise and to get medical insurance. . . ." She also wanted a company vehicle. Tr. at ALJ Ex. 2. Claimant's requests for a pay increase resulted in her voluntary resignation from her employment. Claimant left her employment when her demands for higher pay were not met; this does not qualify her for unemployment compensation benefits.

For the reasons set forth above and others apparent to this Court, the Court should affirm the Deputy, the ALJ, the Board of Review and the Circuit Court's decisions disqualifying the Claimant from receiving unemployment compensation benefits under West Virginia law.

**MATE CREEK SECURITY, INCORPORATED**

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DEBORAH K. MAY, Employee,

Petitioner,

v.

Appeal No.: 072216

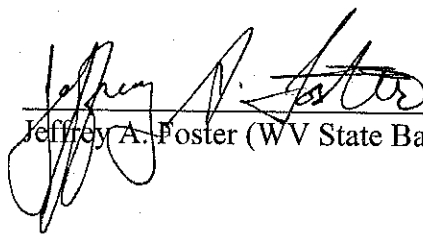
CHAIR and MEMBERS, Board of Review;  
COMMISSIONER, West Virginia Bureau of  
Employment Programs; and MATE CREEK  
SECURITY, INCORPORATED, Employer,

Respondents,

CERTIFICATE OF SERVICE

I, Charles L. Woody, do hereby certify that I have served a true and exact copy of "Brief of Appellee, Mate Creek Security, Incorporated" upon counsel of record by depositing a true and exact copy thereof the United States Mail, First Class postage prepaid, on this 26th day of December, 2007, and addressed as follows:

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